BANK OF AMERICA NATIONAL TRUST SAVINGS ASSOCIATION

v.

CHEONG HOON CHONG

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
LAI KEW CHAI J
FA CHUA J
[CIVIL APPEAL NO. 101 OF 1980]
23 APRIL 1982

BANKRUPTCY: *Charge - Overdraft facilities - Partner declared bankrupt - Foreclosure - Merger of - Relationship of banker and customer - Simple contract debts into a specialty debt - Whether claim barred by limitation - Whether debt acknowledged.*

The respondent and one Lao Kee Yam who were partners of a firm trading as Sharikat Alpha Associates were the customers of the appellants, a bank. The respondent and his partner were granted overdraft and trust receipt facilities, secured by a charge dated 21 November 1969 over the land owned by the respondent and Lao. The charge was to secure partially up to $140,000 the credit facilities granted Sharikat Alpha Associates.

On 25 April 1971 Lao was declared a bankrupt. Due to non-payment of the amount due under the overdraft and trust receipts, the appellants commenced foreclosure proceedings in March 1973 to realise the security held under the charge. About May 1973, the appellants received the sum of $140,000 from the Official Assignee, for and on behalf of the respondent and Lao on the understanding that the property subject to the charge would be discharged and the title deed and the registrable discharge given to the Official Assignee.

The appellants claimed a further sum of $70,454.43 under Clause 21 of the charge, contending that the ordinary relationship of banker and customer had been merged. The learned trial Judge dismissed the claim with costs and thus this appeal.

Held:

Though the letter was addressed to the Official Assignee who was not the agent of the appellants there was an express acknowledgment of the debt. The respondent's solicitors who had the authority to act on behalf of the respondent, sent the said letter with a carbon copy to the appellants' solicitors. The letter constituted a good acknowledgment within the Limitation Act.

[Appeal allowed]

Cases referred to:
Barclays Bank Ltd. v. Beck [1952] 2 QB 47
Re Companaia de Electricidad [1979] 2 WLR 316

Legislation referred to:
Limitation Act [Sing], ss. 26, (2), 27(2)

For the appellant - David Wee (Mooney with him)
For the respondent - Yeo (Hangchi & Yeo).

JUDGMENT

This appeal arises from a judgment of A.P. Rajah, J dismissing the claim by the appellants (plaintiffs) against the respondent (defendant) for the payment of the sum of $70,454.43 being the unsatisfied portion of a debt owing to the appellants in respect of overdraft and trust receipt facilities secured by a charge on property.

At the conclusion of the hearing of the appeal we allowed the appeal and now give our reasons.

The facts were not in dispute. The plaintiffs are bankers carrying on business at their branch at Kuala Lumpur, Malaysia, and elsewhere. The defendant and one Lao Kee Yam trading as Sharikat Alpha Associates were at all material times customers of the plaintiffs at the said branch at Kuala Lumpur and were granted overdraft and trust receipt facilities. The overdraft and trust receipt facilities were secured by a registered charge dated the 21 November 1969, (the charge) over land in the Mukim of Damansara in the district of Kuala Lumpur, which charge was created by the defendant and his partner Lao Kee Yam, co-owners of the property. The charge was to secure partially up to $140,000 the credit facilities granted to Sharikat Alpha Associates.

Lao Kee Yam became a bankrupt on the 25 April 1971. In March 1973, due to the non-payment of the amount due to the plaintiffs by the defendant and Lao Kee Yam under the overdraft and trust receipt facilities the plaintiffs proceeded to realise the security held under the charge by commencing foreclosure proceedings. In about May 1973, the plaintiffs received the sum of $140,000 from the Official Assignee, Kuala Lumpur, who paid this amount for and on behalf of the defendant and the bankrupt Lao Kee Yam, which payment was made on the understanding that the property subject to the charge would be discharged by the plaintiffs and the title deed and the registrable discharge given to the Official Assignee.

The plaintiffs' claim against the defendant (who lives in Singapore) was for the payment of the sum of $70,454.43 under Clause 21 of the charge particulars whereof were set out in the amended statement of claim.

Clause 21 of the Charge provides:

> If on realisation of this security under the National Land Code the amount recovered on the sale of the land hereby charged is less than the amount due under this charge the chargee notwithstanding that the chargee may be the purchaser thereof at such sale shall be entitled to recover from the chargor any difference between the amount due herein and the amount so realised and until such deficit is paid by the chargor shall be entitled to charge interest on such balance due at the rate aforesaid until the date of final payment.

The learned trial Judge in his judgment said that Clause 21 had to be looked at carefully as the plaintiffs' claim was based solely on that clause. After considering the clause he came to the following conclusion:

> From a reading of this clause it is quite apparent that what this clause deals with is a situation where the amount recovered on the sale of the property charged is less than the amount due under the charge. In the instant case it is not disputed that the charge was only stamped up to $140,000 and the law is clearly established that, in such circumstances , the chargor or chargors is or are only liable up to the amount covered by the stamping and no more. (In re. Waterhouse's Policy (1937) 1 Ch 415). From this it must follow that the plaintiffs' claim must stand dismissed with costs. Perhaps had the action been against the defendant, as partner in a firm to which the plaintiff Bank had let monies without security, the presentation and arguments addressed to me might well have been different.

Counsel for the defendant in support of the learned trial Judge's finding submitted that the right of the plaintiffs to claim the sum of $70,145.53 due in respect of overdraft and trust receipt facilities on the ordinary relationship of banker and customer had been merged into their right under the covenant contained in the charge and that the charge and all liabilities under it having been discharged, including the obligation to pay the overdraft and trust receipts, the plaintiffs had no claim.

With all due respect to the learned trial Judge, it seemed to us that he had misunderstood Clause 21. The merger of a simple contract debt into a specialty debt depended on the intention of the parties, which is to be gathered from the documents they have signed. (see *Barclays Bank Ltd. v. Beck* [1952] 2 QB 47). Clause 21 of the charge clearly indicated that there was to be no merger and the contractual rights of the plaintiffs as against the defendant were preserved. When the Charge was discharged the outstanding indebtedness of the defendant on a simple contract remained.

Then counsel for the defendant contended that the plaintiffs' claim was barred by limitation. The answer of the plaintiffs was that there was an acknowledgment of the debt by the defendant in April 1973.

The evidence was that the defendant's solicitors, A.K. Lee & Co. of Kuala Lumpur, wrote the following letter on 5 April 1973, to the Official Assignee, Malaysia (Ex. P9), (the letter):

> Tuan,
>
> **Re: Lao Kee Yum a bankrupt**
>
> We act for Mr. Chong Hoon Chong who is co-proprietor with the abovenamed bankrupt of a piece of land with a factory erected thereon and held under Q.T.(R) 3955 for Lot 18/68 Mukim of Damansara, District of Kuala Lumpur.
>
> The aforesaid land is charged in favour of Bank of America National Trust and Saving Association and the amount outstanding to-date is $206,029.69. We understand that you are in process of selling the said bankrupt's half share in the said land for redemption of the said charge.
>
> Kindly withhold further action in the proposed sale as our client is able to obtain a better offer for the said land.

A carbon copy of the letter was sent to the plaintiffs' solicitors in Kuala Lumpur and also to the defendant.

The defendant said in evidence regarding the letter "I did not specifically authorise him (the solicitor) to enter appearance for me but I did give him general authority to act on my behalf. I have received a carbon copy of letter. I did not do anything about it."

Counsel for the defendant submitted that the letter was not an acknowledgment of the debt within s. 26(2) of the Limitation Act (Cap 10). He said that the letter was not addressed to the plaintiffs but to the Official Assignee; that the Official Assignee was not the agent of the plaintiffs and that A.K. Lee & Co. did not have the express authority of the defendant to send a carbon copy of the letter to the plaintiffs' solicitors.

Under s. 27(2) of the Limitation Act an acknowledgment "may be made by the person by whom it is required to be made under that section (s. 26)" and to be effective it has to be "made to the person, or to an agent of the person, whose title or claim is being acknowledged." In *Re Companaia de Electricidad* [1979] 2 WLR 316, Slade J said (at p. 351):

> In my judgment,..., a written acknowledgment cannot be said to be "made to" a creditor or his agent, within the meaning of s. 24(2), (which is similar to s. 27(2) of our Limitation Act) unless either (a) it is delivered to the creditor or his agent by or with the authority of the debtor or his agent or (b) it is expressly or implicitly addressed to and is actually received by the creditor or his agent.
>
> In my judgment, in case (a) it would not matter that the acknowledgment was not, according to its terms, expressly or implicitly addressed to the recipient. In case (b) it would not matter that the acknowledgment reached the hands of the creditor otherwise than by or with the authority of the debtor. In either case, however, it would be necessary that the creditor should actually receive the acknowledgment before he could rely on it.

In the present case it is true that the letter was addressed to the Official Assignee who was not the agent of the plaintiffs. However, in the letter there was an express acknowledgment of the debt to the plaintiffs and a carbon copy of it as sent to the plaintiffs' solicitors by the defendant's solicitors who had the authority to act on the defendant's behalf. In our view the letter constituted a good acknowledgment within the Limitation Act.

For these reasons we allowed the appeal.

Also found at [1982] CLJ 357